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No. 98-194

In the Supreme Court of the United States

OCTOBER TERM, 1997

BONNIE A. O'NEILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' suit under the Federal Tort Claims Act alleging that the death of a Navy officer was caused by military negligence is barred by *Feres* v. *United States*, 340 U.S. 135 (1950), and subsequent cases interpreting the Act.

2. Whether *Feres* should be overruled.

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OPINIONS BELOW

The order of the court of appeals affirming dismissal of petitioners' complaint (Pet. App. 1a-2a) is unpublished, but the judgment is noted at 142 F.3d 428 (Table). The court's order denying rehearing and the accompanying dissent (Pet. App. 7a-12a) are reported at 140 F.3d 564. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1998. A petition for rehearing was denied on May 1, 1998. Pet. App. 7a-8a. The petition for a writ

of certiorari was filed on July 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the parents and estate of Kerryn O'Neill, formerly an Ensign in the United States Navy. After graduating from the United States Naval Academy in 1993, O'Neill was assigned to the Southwest Division Naval Facilities Engineering Command in San Diego, California. Pet. App. 17a-18a.

Petitioners' complaint alleges that O'Neill met and became engaged to marry George Smith while both were attending the Naval Academy. Pet. App. 14a-15a.[1] Smith graduated from the Academy in 1992, a year before O'Neill, and began to train for duty aboard Navy submarines. As part of that training, he was required to undergo a "psychological screening test" known as the "Subscreen" test. *Id.* at 15a. Because Smith's test showed unusually high scores in a number of areas, including "aggressive/destructive behavior" and "low situational control," standard procedure required that the test results be referred to the Department of Psychiatry at the Naval Hospital in Groton, Connecticut, for further evaluation. *Id.* at 15a-16a. According to the complaint, however, the civilian Navy psychologist who received the results "did not review them and did not interview Smith or require any additional testing." *Id.* at 16a. In November 1993, after finishing his shoreside training, Smith was stationed in San Diego and ordered to report aboard the submarine

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[1] Because petitioners' complaint was dismissed for lack of jurisdiction (see Pet. App. 6a), for purposes of this response we accept as true the factual allegations contained in the complaint.

U.S.S. Salt Lake City for a cruise scheduled to begin on December 2. *Id.* at 18a.

Shortly after Smith arrived in San Diego, O'Neill broke off their engagement. Pet. App. 18a. Smith proceeded to harass or "stalk" O'Neill, appearing uninvited at her duty station and personal quarters, sending her letters accusing her of having relationships with other men, and even calling her mother in the middle of the night to request help in achieving a reconciliation. *Id.* at 18a-19a. On the evening of November 30, 1993, O'Neill requested that another Academy friend and Navy colleague, Lieutenant (j.g.) Alton Grizzard, visit her in her quarters, apparently because she was concerned about Smith's behavior. *Id.* at 19a-20a. Smith came to O'Neill's room in the on-base Bachelor Officers' Quarters three times that night. *Ibid.* On the third visit, at approximately 1:30 on the morning of December 1, he shot and killed O'Neill, Grizzard, and himself. *Id.* at 20a.

2. Petitioners filed suit against the United States, asserting jurisdiction under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), and seeking damages for negligence, wrongful death, and "stalking." Pet. App. 13a-23a (complaint). Their complaint alleges that Ensign O'Neill's death was caused by the Navy's failure to conduct an adequate follow-up evaluation of Ensign Smith after receiving his initial Subscreen scores, and that the stalking and harassment O'Neill experienced after she terminated her engagement to Smith was caused by "the intentional and/or negligent acts or omissions of one or more employees of the Navy." *Id.* at 21a-23a.

According to the complaint, a "full psychological evaluation" undertaken as a follow-up to the Subscreen test "would have revealed what later events

showed—that Smith had a serious personality disorder, either a borderline personality or other type of disorder characterized by extreme aggressiveness and dependency, high risk of danger to himself and others, and extreme lack of fitness for submarine duty." Pet. App. 17a. Moreover, the complaint contends, "[h]ad Smith been evaluated according to Navy regulations," O'Neill's death would have been averted, because "[c]ommon psychiatric treatments such as consultation with a psychiatrist, drugs or, if necessary, hospitalization would have significantly reduced or eliminated Smith's aggressive/destructive tendencies," and in addition "the Navy could have taken other corrective measures to place Smith in a situation of no risk to others or to himself." *Ibid.*; see also *id.* at 21a. Instead, "in violation of its own required procedures, the Navy failed to evaluate Smith's Subscreen scores"; and, as a proximate result of that failure, "the pressure of Smith's imminent separation and isolation due to submarine sea duty led to a rapid rise in paranoia, anxiety, and fear of loss of his obsessional focus (Kerryn O'Neill)," ultimately leading him to "act[] on an elemental and primitive level" by killing O'Neill, Grizzard, and himself. *Ibid.*

The district court dismissed petitioners' complaint on the basis of the *Feres* doctrine, which generally bars FTCA suits by members of the armed services for injuries that "arise out of or in the course of military duty." *Feres* v. *United States*, 340 U.S. 135, 146 (1950); see Pet. App. 3a-6a. The court rejected petitioners' argument that "the murder was not in the course of Ensign O'Neill's service activity because she was off-duty at the time and engaged in a personal activity." *Id.* at 4a. The court noted, instead, that O'Neill "was not on leave status [at the time of the attack], and that

she was off-duty in her private quarters at the military base." *Id.* at 5a. Under those circumstances, the court concluded, "*Feres* precludes recovery." *Ibid.*

The court of appeals affirmed. Pet. App. 1a-2a. In a brief order, the court noted that it "agree[d] with the district court that the *Feres* doctrine applie[d]," although it "d[id] not place the same emphasis on the situs of injury." *Id.* at 2a n.1. In the court's view, the case was "controlled by the Supreme Court's decision in *United States* v. *Shearer*, 473 U.S. 52 (1985)." *Ibid.*

Chief Judge Becker, joined by Judges Sloviter and McKee, dissented from the court's subsequent rejection of petitioner's suggestion that it rehear the case en banc. Pet. App. 9a-12a. Judge Becker would have distinguished *Feres* and *Shearer* on the ground that O'Neill's injuries were "wholly unrelated to her military service." *Id.* at 11a. In addition, noting scholarly and judicial criticism of the *Feres* doctrine, he "urge[d] the Supreme Court to grant *certiorari* and reconsider *Feres*." *Id.* at 12a.

ARGUMENT

The court of appeals' decision applies settled law to particular facts, in a manner compelled by a prior decision of this Court. The Court should not grant review, as petitioners ask, to reconsider the *Feres* doctrine. The Court reexamined and reaffirmed *Feres*' construction of the Federal Torts Claims Act in 1987, and any further argument for a different result should be directed to Congress.

1. As the court of appeals recognized (Pet. App. 2a n.1), petitioners' case is controlled by this Court's decision in *United States* v. *Shearer*, 473 U.S. 52 (1985). In *Shearer*, one Army private (Heard) kidnapped and murdered another (Shearer), who was off duty and

away from his military base at the time. *Id.* at 53. Shearer's mother and his estate sought damages from the United States under the FTCA, contending that the Army was responsible for Shearer's death because it had reason to know that Heard was dangerous, but "negligently and carelessly failed to exert a reasonably sufficient control over [him], . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to remove [him] from active military duty." *Id.* at 58 (ellipsis in Court's opinion). Reversing the court of appeals, which had "placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered" (*id.* at 57), this Court held that the suit was barred by *Feres* (*id.* at 57-59). Focusing on whether the suit would "require[] the civilian court to second-guess military decisions" or "might impair essential military discipline," the Court concluded that the claims at issue went "directly to the 'management' of the military" and "call[ed] into question basic choices about the discipline, supervision, and control of a serviceman." *Id.* at 57-58. The suit thus "str[uck] at the core" of the concerns underlying *Feres*' construction of the FTCA, because "[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct." *Ibid.*

This case is precisely the "type of suit" that *Shearer* held cannot be maintained under the FTCA. The complaint contends that Ensign Smith's "Subscreen" test results—like Private Heard's previous manslaughter conviction (see 473 U.S. at 54)—put the Navy on notice

that he posed a danger to others, and that the Navy is responsible for Ensign O'Neill's death because its responsible officers thereafter failed to undertake appropriate "corrective measures to place Smith in a situation of no risk to others or to himself." Pet. App. 17a. The "measures" petitioners have suggested include not only requiring Smith to undergo "[c]ommon psychiatric treatments such as consultation with a psychiatrist, drugs or, if necessary, hospitalization" (*ibid.*), but also "removal of Smith from submarine duty, change of duty station, [or] separation from the Navy." C.A. App. 22 (Pet. Admin. Claim, Compl. Exh. A, Attach. 2).[2] Just as in *Shearer*, however, any inquiry into whether the Navy could or should have undertaken any such measures with respect to Smith would inevitably "require[] the civilian court to second-guess * * * 'complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force.'" *Shearer*, 473 U.S. at 57-58 (second ellipsis in Court's opinion).[3]

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[2] Although petitioners' "stalking" claim is stated very generally (Pet. App. 22a-23a), on its face it suggests the possibility of further inquiry into, for example, whether any superior in either Smith's or O'Neill's chain of command was or should have been aware of Smith's harassing behavior, and, if so, whether any action was or should have been taken. See also *id.* at 19a (alleging conversation between Smith and the Executive Officer of his submarine on the day before the murder); *id.* at 19a-20a (awareness of situation among other Navy personnel).

[3] In this case, the entire sequence of events that led to Ensign O'Neill's death was inextricably bound up with any number of personal and command decisions "incident" to her military service. O'Neill and Smith allegedly met and became engaged to be married while both were attending the Naval Academy. Pet. App. 14a-15a. At the time that O'Neill terminated the engagement, both were stationed in San Diego. *Id.* at 18a. And the constraints of

Petitioners seek to distinguish *Shearer* on the ground that it involved a claim that the death at issue "was attributable to the negligence of the commanding officers of the decedent." Pet. 18. That is not correct: the decisions at issue in *Shearer* were made by the commanding officers of the assailant, Private Heard, not the commanding officers of the decedent. Moreover, three senior officers in Heard's chain of command had, in fact, recommended that he be discharged as "unsuitable for military service"; the gravamen of the complaint was that, despite those recommendations, "the Army" had "failed to make a 'final determination' on Heard's discharge" by the time of the murder. *Shearer* v. *United States*, 723 F.2d 1102, 1104-1105 (3d Cir. 1984). That claim is strikingly similar to petitioners' contention (Pet. 19) that "Navy judgments and procedures, including the formulation and application of the Subscreen test, were entirely adequate and would have worked" if they had been properly implemented, but that the Navy should be liable for an alleged negligent failure by one of its psychologists to comply with those procedures. Likewise, petitioners' argument (Pet. 18-19) that there are "no military judgments" involved in this case because the Navy psychologist who received Smith's Subscreen results simply "engaged in a clear-cut dereliction of nondiscretionary duty" is foreclosed by *Shearer*, 473 U.S.

Naval duty, discipline, and loyalty to fellow officers no doubt affected, not only Smith's ability to tolerate the emotional stress caused by O'Neill's decision (see *id.* at 21a), but also O'Neill's ability or willingness to take steps to address Smith's aggressive and harassing behavior. From beginning to unhappy end, O'Neill's relationship with Smith both "ar[ose] out of" and played itself out "in the course of activity incident to service." *Feres*, 340 U.S. at 146.

at 58-59. As is clear from the complaint's reliance on an internal Navy report to support this allegation (Pet. App. 15a), any trial of petitioners' claim would inevitably require Navy officers "to testify in court as to each other's decisions and actions"—precisely the sort of intrusive judicial inquiry, prejudicial to internal military order and discipline, that the *Feres* bar serves to avoid. *Shearer*, 473 U.S. at 58.[4]

Right or wrong, the decisions of responsible Navy personnel to refrain from further examination of Ensign Smith's mental state, to assign him to active duty on a submarine, and to order him to report for duty to a base in San Diego, near his (at the time) fiancée, were all "decision[s] of command." *Shearer*, 473 U.S. at 59. Whether or not petitioners "contest the wisdom of broad military policy[,] * * * their claims [do] not fall within the Tort Claims Act because they [are] the *type* of claims that, if generally permitted, would involve the

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[4] Analyzing the reasonableness of an officer's understanding and implementation of military regulations would necessarily require courts to interpret military policies and to "second-guess the implementation of military orders or to appraise alleged negligent acts or omissions committed in the course of military duty." *Stephenson* v. *Stone*, 21 F.3d 159, 164 (7th Cir. 1994). The courts have therefore routinely applied *Feres* even where military officials allegedly failed to follow military regulations. *Ibid.*; see also *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997); *Satterfield* v. *United States*, 788 F.2d 395, 398 (6th Cir. 1986); *Major* v. *United States*, 835 F.2d 641, 645 (6th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). The complaint in this case, of course, alleges not only that the Navy should have tested Ensign Smith more fully, thus confirming his dangerousness, but that it should then have made one or more of a number of possible command decisions (mandatory treatment, reassignment, separation from service) that would, petitioners claim, ultimately have protected Ensign O'Neill. See Pet. App. 17a, 21a.

judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Ibid.* Accordingly, here, as in *Shearer*, "[petitioners'] attempt to hale [Navy] officials into court to account for their supervision and discipline of [Ensign Smith] must fail." *Ibid.*

2. As is evident from the foregoing discussion, there is no substance to petitioners' contention (Pet. 19-22) that the court of appeals' unpublished order in this case "worsens [a] conflict among the courts of appeals in assessing whether an injury to a servicemember was incident to the injured person's military service." Pet. 19. The court below did not, as petitioners assert, "focus narrowly on whether the injured servicemember was on active duty" (Pet. 20); it simply stated, correctly, that this case was "controlled by" *Shearer* (Pet. App. 2a n.1). The other cases petitioner contends have adopted an inappropriately narrow focus all involved medical malpractice claims, which are similarly controlled by *Feres* itself. See 340 U.S. at 136-138 (describing malpractice claims involved and characterizing injuries received as "incident to the [patients'] service"). All the courts of appeals follow the same rule in malpractice cases.[5]

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[5] See, *e.g.*, *Borden* v. *Veterans Administration*, 41 F.3d 763 (1st Cir. 1994); *Wake* v. *United States*, 89 F.3d 53 (2d Cir. 1996); *Loughney* v. *United States*, 839 F.2d 186 (3d Cir. 1988); *Appelhans* v. *United States*, 877 F.2d 309 (4th Cir. 1989); *Schoemer* v. *United States*, 59 F.3d 26 (5th Cir.), cert. denied, 516 U.S. 989 (1995); *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997); *Selbe* v. *United States*, 130 F.3d 1265 (7th Cir. 1997); *Brown* v. *United States*, 151 F.3d 800 (8th Cir. 1998); *Jackson* v. *United States*, 110 F.3d 1484 (9th Cir. 1997); *Quintana* v. *United States*, 997 F.2d 711 (10th Cir. 1993); *Ricks* v. *United States*, 842 F.2d 300 (11th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); *Lombard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983).

Petitioners cite other cases for the proposition that application of the *Feres* rule to particular facts does not depend on any single factor, and should not be "mechanistic." Pet. 20. There is no dispute on that point. See, *e.g.*, *Shearer*, 473 U.S. at 57 ("The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."). Petitioners cannot point, however, to any particularized conflict among the lower courts involving the application of *Feres*' concededly contextual rule to cases involving facts and circumstances similar to those presented here. To the contrary, those courts of appeals that have faced the question have all held that *Feres* bars suits alleging that military negligence was responsible for injuries inflicted by one service member on another. See *Stephenson* v. *Stone*, 21 F.3d 159, 163 (7th Cir. 1994) (alleged failure to supervise soldier and prevent him from acquiring and retaining murder weapon); *Estate of McAllister* v. *United States*, 942 F.2d 1473, 1474 (9th Cir. 1991) (alleged failure to supervise soldier despite knowledge that he was a "paranoid schizophrenic" with potentially dangerous tendencies), cert. denied, 502 U.S. 1092 (1992); *Dozler* v. *United States*, 869 F.2d 1165, 1166 (8th Cir. 1989) (alleged failure to warn one service member about another's dangerous personality disorder, to provide her with adequate security, and to maintain preestablished security measures designed to protect personnel in on-base housing); *Satterfield* v. *United States*, 788 F.2d 395, 396, 398 (6th Cir. 1986) (alleged failure to exercise proper supervision and control to warn and protect decedent from two other service members); see also *Skees* v. *United States*, 107 F.3d 421 (6th Cir. 1997) (alleged failure to prevent soldier from committing sui-

cide); *Persons* v. *United States*, 925 F.2d 292, 299 (9th Cir. 1991) (same).

3. Ultimately, petitioners' principal argument (Pet. 11-17) is not that the court of appeals erred in relying on *Shearer* to affirm the dismissal of this case, but that *Feres* and all its successors, including *Shearer*, rest on an incorrect interpretation of the Federal Tort Claims Act, and should be overruled. That argument does not warrant review.

Petitioners rely heavily on the dissent in *United States* v. *Johnson*, 481 U.S. 681, 692 (1987), decided two years after *Shearer*. In *Johnson*, the Court carefully reviewed the history of the *Feres* doctrine and the principal rationales that underlie it. *Id.* at 686-691. The Court then applied the doctrine to bar a suit by the estate of a service member who was killed in an accident that occurred "incident to his military service" (*id.* at 691), rejecting the argument that *Feres* did not apply because the complaint alleged that the accident was caused by the negligence of a civilian air traffic controller, rather than through the fault of another service member (*id.* at 683-688). Noting that the Court had "never deviated" from *Feres*' initial holding, that the rule of that case "ha[d] been applied consistently to bar all suits on behalf of service members against the government based upon service-related injuries," and that Congress had not seen fit to alter the *Feres* standard "in the close to 40 years since it was articulated," the Court "decline[d] to modify the doctrine at this late date." *Id.* at 686-688. Four Justices, in dissent, criticized *Feres* and characterized the Court's holding as an improper extension of the doctrine, but specifically declined to consider whether it would be appropriate to overrule *Feres* itself. *Id.* at 692, 703.

There is nothing to justify reexamination in this case of *Johnson*'s considered decision to "reaffirm" the holding of *Feres*. 481 U.S. at 692. In particular, as we explained in opposing a similar request for review in *Sonnenburg* v. *United States*, cert. denied, 498 U.S. 1067 (1991) (No. 90-539), this Court has repeatedly made clear that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court has] done." 90-539 Br. in Opp. at 5, quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).[6] In *Feres* itself, the Court frankly acknowledged the difficulty of the statutory question presented, and commented on the appropriate means for correction of any error: "Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy." 340 U.S. at 138. In *Johnson*, the Court noted that Congress had allowed 40 years to pass without taking up that invitation to revisit the issue. 481 U.S. at 686. No new development in the additional 11 years that have since elapsed has diminished the force of that simple observation, or undermined the basic arguments that support this Court's original interpretation of the Tort Claims Act. See, *e.g.*, *Johnson*, 481 U.S. at 688-691; 90-539 Br. in Opp. at 6-11.[7] The Court has repeatedly

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[6] We have provided petitioners with a copy of our brief in *Sonnenburg*.

[7] Petitioners argue specifically that as "parents of a dead servicemember [they] are not entitled to [military] benefits," so that one traditional rationale for the *Feres* rule does not apply in their situation. Pet. 16; see *Feres*, 340 U.S. at 144-145 (discussing availability of statutory benefits). While that point would hardly

declined similar invitations to reconsider *Feres* in recent years, and there is no reason for a different result here. See *George* v. *United States*, cert. denied, 118 S. Ct. 1053 (1998); *Bisel* v. *United States*, cert. denied, 118 S. Ct. 695 (1998); *Hayes* v. *United States*, cert. denied, 516 U.S. 1814 (1995); *Schoemer* v. *United States*, cert. denied, 516 U.S. 989 (1995); *Forgette* v. *United States*, cert. denied, 513 U.S. 1113 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1998

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be dispositive even if true, we do not understand it to be accurate. Materials submitted to the district court on this point (see Pet. App. 4a) indicate that a death gratuity of $6000 was paid to Ensign O'Neill's sister under 10 U.S.C. 1475-1480, see C.A. App. 60, and that each of the individual petitioners received a death benefit of $50,000 under O'Neill's Servicemen's Group Life Insurance (SGLI) policy, C.A. App. 61-66. These are the kinds of statutory benefits to which the Court has previously adverted in the *Feres* context. See *Johnson*, 481 U.S. at 683 n.1 (referring to death gratuity and life insurance benefits).